IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Christopher Peters, by his father and next friend Grady Peters, and Grady Peters and Rosetta Peters Individually,	)	
Plaintiffs,	)	
v.	)	C.A. No. 10C-06-043 JRJ
Texas Instruments Incorporated,	)	
Defendant.	)	

Date Submitted: September 16, 2011
Date Decided: September 30, 2011

Upon Defendant Texas Instruments Incorporated's
Motion to Dismiss: **GRANTED**

Ian C. Bifferato, Esquire, David W. deBruin, Esquire, Kevin G. Collins, Esquire, John Z. Haupt, Esquire, Richard S. Gebelein, Esquire, Bifferato, LLC, 800 North King Street, 1st Floor, Wilmington, Delaware, 19801, Charles S. Seigel, Esquire (argued), *pro hac vice*, Waters & Kraus, LLP, 3219 McKinney Ave., Dallas, Texas 75204, attorneys for the plaintiffs.

Katharine L. Mayer, Esquire, McCarter & English, LLP, 405 North King Street, 8th Floor, P.O. Box 111, Wilmington, Delaware, 19899, Mary A. Wells, *pro hac vice*, Marilyn S. Chappell, Esq. (argued), *pro hac vice*, Wells, Anderson & Race, LLC, 1700 Broadway, Suite 1020, Denver, Colorado 80290, attorneys for the defendant.

Jurden, J.

I. BACKGROUND AND PROCEDURAL HISTORY

Defendant, Texas Instruments Incorporated ("T.I."), has filed a Motion to Dismiss, arguing that all of the plaintiffs' claims are barred by the exclusivity provision of the Texas Workers' Compensation Act.[1]

Plaintiffs allege that while employed at T.I.'s Texas Facilities, Grady Peters was exposed to "hazardous, genotoxic, and reproductively toxic substances"[2] which caused an insult to his reproductive system. Plaintiffs allege that Grady's exposure occurred "prior to and at the time of the conception and gestation of his son, Christopher Peters . . . ."[3] Christopher Peters was born with birth defects, including retinoblastoma.[4] According to plaintiffs, as a result of T.I.'s wrongful conduct, Christopher's injuries "were caused or contributed to by Plaintiff Grady Peters' exposure."[5]

There is no dispute that Texas law, not Delaware law, applies to the issues involved in this motion. T.I. argues that because all of the plaintiffs' claims "stem from an alleged workplace injury to Grady," *i.e.*, contamination or alteration of his

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[1] *See* Defendant Texas Instruments Incorporated's Motion to Dismiss ("Mot. to Dism.") (Trans. ID. 34594009).
[2] First Amended Complaint ("FAC") at ¶ 28 (Trans. ID. 33786387).
[3] *Id.* at ¶ 5.
[4] *Id.* at ¶ 1.
[5] *See id.* at ¶ 27 ("Grady Peters sustained an insult to his reproductive system as a result of his employment at TI that caused injuries to Plaintiff Christopher Peters."); *id.* at ¶28 ("As a consequence of the foregoing misconduct on the part of Defendant, and Plaintiff Grady Peters' exposure to hazardous, genotoxic, and reproductively toxic substances, pollutants, and contaminants, Plaintiff Christopher Peters sustained . . . injuries and/or damages."); *id.* at ¶ 22 ("Plaintiff Christopher Peters' personal injuries were caused or contributed to by Plaintiff Grady Peters' exposure to hazardous, genotoxic, and reproductively toxic substances, pollutants, or contaminants released into the environment from a facility."); *see also* Plaintiffs' Opposition to Defendant Texas Instruments Incorporated's Motion to Dismiss (Pltfs.' Opp.") at p. 2 (Trans. ID. 35684320) ("All of plaintiffs' claims . . . arise out of the infant plaintiff's severe birth defects which were proximately caused by T.I.'s misconduct.").

semen through exposure to toxic substances, recovery under workers' compensation benefits is the exclusive remedy.[6] In opposition, plaintiffs argue that T.I. has failed to make a showing that it is protected by the "Texas workers' compensation regime," and plaintiffs' claims are not derivative.[7] For those reasons, plaintiffs assert these claims are not barred by the exclusivity provision of the Texas Workers' Compensation Act.[8]

In its Reply Brief,[9] T.I. argues that: (1) Grady's claim would have been the basis for a workers' compensation claim had it been timely asserted, and all of the Plaintiffs' claims derive from Grady's alleged workplace exposure, therefore, these claims are barred; and (2) plaintiffs' claim for preconception tort liability is not recognized under Texas law.[10] For the reasons that follow, T.I.'s Motion to Dismiss is **GRANTED**.

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[6] *See* Mot. to Dism. at ¶¶ 4, 5.
[7] *See* Pltfs.' Opp. at p. 3.
[8] *Id.*
[9] Shortly after T.I.'s Reply Brief was filed, plaintiffs filed a motion to strike the portion of the brief discussing preconception tort liability, claiming "this argument was not raised by T.I. in its motion to dismiss, nor was it previously raised in any other fashion." Plaintiffs argued that, "T.I.'s introduction for the first time in its Reply Brief of the 'preconception tort' argument . . . is a highly improper tactic calculated to deprive plaintiffs of the opportunity to respond to this meritless claim." Plaintiffs asked the Court not only to strike this portion of T.I.'s brief, but to rule that T.I. waived this argument. In the alternative, plaintiffs asked for leave to file a surreply limited to thirty-five pages. After hearing oral argument on May 23, 2011, the Court denied plaintiffs' Motion to Strike the Reply and permitted plaintiffs to file a thirty page surreply. *See* Order dated May 27, 2011 (Trans. ID. 37831332).
[10] *See* Reply Brief in Support of Motion to Dismiss of Defendant Texas Instruments Incorporated ("Reply") (Trans. ID. 36101618).

II. FACTS

Christopher Peters was born on June 11, 1995 with severe birth defects, including retinoblastoma.[11] As a result of the retinoblastoma, Christopher had to have his eye removed and is partially blind.[12] Grady Peters is Christopher's father, and Rosetta Peters is his mother. Christopher, Grady, and Rosetta ("Plaintiffs") reside in the State of Texas.[13] Plaintiffs claim that Christopher's numerous birth defects were proximately caused or contributed to by Grady's exposure to hazardous, genotoxic, and reproductively toxic substances, pollutants or contaminates released into the environment from T.I. facilities in Texas where Grady was employed from approximately 1980 until 1997.[14]

According to plaintiffs, T.I. utilized hazardous toxic chemicals or substances in "clean rooms," used for manufacturing semiconductor computer "wafers," "chips" and "boards."[15] Grady was allegedly exposed to these harmful chemicals while performing duties associated with the "clean rooms."[16] Grady was required to use these chemicals in the "clean rooms" and elsewhere in T.I.'s facilities.[17]

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[11] *See* FAC at ¶ 1. Retinoblastoma is a hereditary malignant tumor of the retina that develops during childhood, is derived from retinal germ cells, and is associated with a chromosomal abnormality. MERRIAM-WEBSTER'S MEDICAL DICTIONARY (Electronic ed. 2010).
[12] *Id.* at ¶¶ 1-28.
[13] *Id.* at ¶ 2-3.
[14] *Id.* at ¶ 4.
[15] *Id.* at ¶ 7.
[16] *Id.* at ¶ 4.
[17] *Id.* at ¶11.

Plaintiffs allege that T.I. failed to utilize proper measures to prevent its workers from being exposed to these harmful chemicals.[18] No ventilation system was used to protect workers like Grady in the "clean rooms" from inhalation or skin exposure to the chemicals that were being used.[19] As a result, the chemicals recirculated and remained in the air."[20] Also, any "protective" gear worn by employees only served to protect the "chips" from particles on the employees' clothing and bodies.[21] Contrary to its name, the protective gear provided no protection to the employees.[22]

Grady claims that prior to and at the time of his son's conception he was exposed to some or all of the following chemicals and substances: (a) Ethylene glycol ethers, (b) Propoylene glycol ethers, (c) Positive Photoresist systems, (d) Fluorine compounds, (e) Chlorinated compounds, (f) Radio frequency radiation and ionizing radiation, (g) Arsenic compounds, (h) Volatile organic degreasing and cleaning solvents, (i) Organic solvents, and (j) Epoxy resign based glues.[23] Plaintiffs further allege that T.I. failed and refused to warn, advise, and or protect its workers of and from the dangerous characteristics and health threats associated with exposure to these chemicals and substances.[24]

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at ¶ 5.
[24] *Id.* at ¶¶ 13, 14.

III. DISCUSSION

T.I.'s motion seeks dismissal for failure to state a claim.[25] As noted by the Delaware Supreme Court:

> Long-settled doctrine governs this Court's review of dismissals under Rule 12(b)(6). Under that doctrine, the threshold for the showing a plaintiff must make to survive a motion to dismiss is low. Delaware is a notice pleading jurisdiction. Thus, for a complaint to survive a motion to dismiss, it need only give "general notice of the claim asserted." A court can dismiss for failure to state a claim on which relief can be granted only if "it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief." On a motion to dismiss, a court's review is limited to the well-pleaded allegations in the complaint. An allegation, "though vague or lacking in detail" can still be well-pleaded so long as it puts the opposing party on notice of the claim brought against it. Finally, in ruling on a motion to dismiss under Rule 12(b)(6), a trial court must draw all reasonable factual inferences in favor of the party opposing the motion.[26]

A. Texas Workers' Compensation Exclusivity Bar

The first issue for determination is whether the exclusive remedy provision of the Texas Workers' Compensation Act bars claims for injuries suffered by an employee's child caused or contributed to by the employee's exposure to

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[25] Super Ct. Civ. R. 12(b)(6).

[26] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) (*quoting Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (other citations omitted))); *see also Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC, et. al.*, 2011 WL 3612992, at *5-6 (Del. Super.) (stating that "we emphasize that, until this Court decides otherwise or a change is duly effected through the Civil Rules process, the governing pleading standard in Delaware to survive a motion to dismiss is reasonable conceivability," not the "plausibility" standard adopted by the federal courts.) (internal quotations omitted).

hazardous substances in the workplace.[27] Plaintiffs argue that because Christopher is not an employee of T.I., he is not eligible for workers' compensation under the Texas Labor Code for his personal injuries,[28] and thus, his personal injury claims cannot be barred. Under Texas law, recovery of workers' compensation benefits is the exclusive remedy available to an employee covered by workers' compensation insurance coverage against an employer for a work-related injury sustained by the

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[27] As a threshold matter, Plaintiffs argue that T.I.'s motion on this ground must fail because T.I. has failed to meet its burden of showing that T.I. "is covered by the Texas Workers' Compensation Regime in the first place." *See* Pltfs.' Opp. at p. 3. The Court disagrees with this contention because it is satisfied that: (1) Grady's alleged workplace exposure could have provided the basis for a workers' compensation claim, had he chosen to assert one; (2) there is nothing in the record to suggest T.I. , which has been headquartered in Texas since its founding over 75 years ago, and is on the largest employers in Texas, is not a workers' compensation subscriber; (3) when there is no dispute as to subscriber status, Texas courts do not require an affirmative showing of status to support the exclusive remedy defense; and (4) T.I. represents that "[e]vidence to affirmatively demonstrate T.I.'s subscriber status can easily be provided . . . ." *Id.*

[28] *See* Texas Labor Code §§ 406.031, 408.001:

> 406.031. LIABILITY FOR COMPENSATION.
> (a) An insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if:
> (1) at the time of injury, the employee is subject to this subtitle; and
> (2) the injury arises out of and in the course and scope of employment.
> (b) If an injury is an occupational disease, the employer in whose employ the employee was last injuriously exposed to the hazards of the disease is considered to be the employer of the employee under this subtitle.
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> 408.001. EXCLUSIVE REMEDY; EXEMPLARY DAMAGES.
> (a) Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustainted by the employee.
> (b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.
> (c) In this section, "gross negligence" has the meaning assigned by Section 41.001, Civil Practice and Remedies Code.
> (d) A determination under Section 406.032, 409.002, or 409.004 that work-related injury is noncompensable does not adversely affect the exclusive remedy provisions under subsection (a).
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> *See generally* Pltfs.' Opp.

employee.[29] According to T.I., Grady's potential eligibility for workers' compensation benefits arises from the following allegations:

> Grady Peters sustained an insult to his reproductive system as a result of his employment at T.I. that caused injuries to Plaintiff Christopher Peters.
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> As a consequence of the foregoing misconduct on the part of Defendant, and Plaintiff Grady Peters' exposure to hazardous, genotoxic, and reproductively toxic substances, pollutants, and contaminants, Plaintiff Christopher Peters sustained . . . injuries and/or damages . . . .[30]

Thus, T.I. argues the "foundational allegations" for plaintiffs' claims are that Grady, through his work at T.I., sustained workplace exposure to reproductively toxic substances that caused insult to his reproductive system, *i.e.*, his sperm.[31] T.I. points out that under plaintiffs' causation theory, if Grady's sperm had not been damaged by such exposure, Christopher would not have been born with birth defects.[32] To put it simply, Christopher's injury is entirely dependent on his father's alleged workplace exposure.

T.I. goes on to assert that Grady's alleged workplace exposure was a compensable injury under Texas Workers' Compensation statutes,[33] and Grady's failure to file a workers' compensation claim does not prohibit application of the

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[29] Tex. Lab. Code § 408.001(a) (2010).
[30] FAC at ¶¶ 27, 28, 38, and 39.
[31] *See* Reply at p. 3.
[32] *Id.*
[33] *See id.*

exclusivity bar.[34] T.I. reasons that if a tort plaintiff could avoid the workers' compensation exclusivity bar merely by failing to file a claim, the statutory system would be meaningless.[35] The Court agrees with this analysis. But this does not resolve the question of whether *Christopher's* personal injury claims are barred by the exclusivity provision.

If Christopher's claims are "derivative," they are barred by the exclusive remedy provision of the Texas Workers' Compensation Act.[36] According to plaintiffs, Christopher's injuries "are the proximate result of T.I.'s violation of duties owed directly to him. Plaintiffs' causes of action are thus fundamentally distinct from a derivative claim . . . ."[37] Plaintiffs point out that no Texas case is directly on point and suggest "this is perhaps only because no defendant in Texas has ever seriously asserted the argument T.I. makes here."[38] T.I. counters that it is clear under Texas law that the workers' compensation exclusivity bar "applies to all of Plaintiffs' claims, as claims of family members that derive from an employee's alleged workplace injury fall within the scope of the bar,"[39] and cites several cases in support of this argument which the Court will address *in seriatim*.

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[34] *See id.* at p. 4.
[35] *Id.*
[36] *Aguirre v. Vasquez*, 225 S.W.3d 744, 753 (Tex. App. 2007) ("The [Texas Workers' Compensation] Act also bars actions for compensatory damages under the Wrongful Death Act or the Survival Statute because those claims are derivative of the decedent's claim."); *Bennight v. Western Auto Supply Co.*, 670 S.W.2d 373, 376 (Tex. App. 1984) (abrogated on other grounds).
[37] *See* Pltfs.' Opp. at p. 5.
[38] *Id.* at p. 6.
[39] Mot. to Dism. at ¶ 5.

In *Aguirre v. Vasquez*,[40] four employees were driving home from a job when they encountered a dust storm. The driver decided to stop the truck and "wait out the storm."[41] While waiting, a tractor-trailer stuck the employees' truck killing three employees and injuring another.[42] The court held that surviving family members could not bring a lawsuit to recover damages arising out of the deaths of their relatives killed in the course of their employment, because their remedy was limited to workers' compensation.[43] The court also found that the wrongful death and survival claims were barred because they were "derivative" of the decedent employees' claims.[44]

Similarly, in *Maderazo v. Archem Co.*,[45] the court held that a personal injury claim filed by the parents of an employee killed in a workplace explosion was barred by the exclusive remedy provision of the Workers' Compensation Act. The court noted that the exclusive remedy provision applied to the parents because their son, had he survived, would only have been entitled to a workers' compensation claim because he was injured in the course of his employment.[46] Where an employee's injury is covered by workers' compensation, relatives making a claim

[40] *Aguirre*, 225 S.W.3d at 749.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 753.
[44] *Id.*
[45] *Maderazo v. Archem Co.*, 788 S.W.2d 395, 396, 398-99 (Tex. App. 1990).
[46] *Id.* at 397.

on the employees' injuries cannot recover under a common law theory.[47] Because the claim was covered, and the decedent's parents' injuries were derivative of their son's injuries, they had no viable claim.[48]

T.I. relies on *Bennight v. Western Auto Supply Co.*[49] to distinguish between an accidental injury claim, which is covered by the exclusivity bar to the Texas Workers' Compensation Act, and an intentional tort claim, which is not barred. In *Bennight*, the court allowed a claim by a husband for loss of consortium where the husband's claim arose out of his employee-wife's work-related injury.[50] Because the wife's injuries were a result of her employer's intentional misconduct, the claim was not barred.[51] The court allowed the husband's claim to proceed because the injury sustained by the employee-wife was not "accidental," and thus, not barred by the exclusivity provision contained in the Texas Workers' Compensation Act.[52]

Plaintiffs also rely on *Snyder v. Michael's Stores Inc.*,[53] a California case, to support their argument that T.I.'s claim that the exclusivity bar applies to children

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[47] *See id.*
[48] *Id.*
[49] *Bennight*, 670 S.W.2d at 376.
[50] *Id.* at 378.
[51] *Id.* at 374. (The employee-wife's job required her to work in a warehouse periodically. The manager of the store employee-wife worked in knew the warehouse was infested with bats, and that bats terrified the employee-wife. Nevertheless, employee-wife was forced on several occasions to run "business errands" in the warehouse. Eventually employee-wife was bitten by a bat, which required a rabies vaccination. Unfortunately, employee-wife reacted negatively to the vaccination which caused her to be emotionally disturbed and permanent blindness).
[52] *Id.* at 376. (noting that had the employee-wife's injuries been accidental, the husband's claim would not be compensable because the claim would have been derivative of his wife's claim).
[53] *Snyder v. Michael's Stores Inc.*, 945 P.2d 781 (Cal. 1997).

of an employee has "been uniformly rejected" elsewhere.[54] In *Snyder*, a pregnant mother was exposed to "hazardous levels of carbon monoxide" as a result of her employment.[55] Her daughter, who was *in utero*, suffered permanent brain damage causing her to be born with cerebral palsy and other disabling conditions.[56] The court of appeals reversed the trial court's dismissal of the plaintiff's claims.[57] Affirming the court of appeals, the California Supreme Court recognized that while some claims by non-employees are derivative of injuries to employees, claims for direct injuries to non-employees are not barred.[58]

T.I. alleges *Snyder* is inapposite because it involves both an alleged work-place exposure or injury to an employee-mother and a separate and distinct injury to a fetus *in utero*.[59] T.I. notes that the child's claim in *Snyder* would have been barred as derivative if it were "legally dependent" upon an injury of the employee mother.[60] The court in *Snyder* noted that "[t]he [derivative injury] rule applies when the plaintiff, in order to state a cause of action, *must* allege injury to another

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[54] *See* Pltfs.' Opp. at 6.
[55] *Snyder*, 945 P.2d at 783.
[56] *Id.*
[57] *Id.* at 782.
[58] *See id.* at 784-85. ("Neither the statutes nor the decisions enunciating the rule against workers' compensation exclusivity extends to all third-party claims deriving from some 'condition affecting' the employee. Nor is a non-employee's injury collateral to or derivative of an employee injury merely because they both resulted from the same negligent conduct by the employer. The employer's civil immunity is not for all liability resulting from negligence towards employees, but only for all liability, to any person, deriving from an employee's work-related *injuries*." (emphasis in the original). Because the daughter did not claim any damages for injury to her mother, and because the derivative injury doctrine "does not bar civil actions by all children who were harmed *in utero* through some event or condition affecting their mothers; it bars only attempts by the child to recover civilly for the mother's own injuries or for the child's legally dependent losses[,]" recovery for the child was not precluded).
[59] *See* Reply at p. 5.
[60] *See* Reply at p. 6; *Snyder*, 945 P.2d at 786.

person – the employee."[61] Thus, a derivative claim would not exist in the absence of an injury to the employee.[62]

Plaintiffs also rely on *Ransburg Industries v. Brown*,[63] in which the court held that a child's injury was non-derivative because it did not arise "on account of the injury sustained by the employee. Rather, this action seeks to recover for the injury sustained . . . while in utero . . . ." In *Ransburg*, the plaintiff was in her first trimester of her pregnancy.[64] The floors at the Ransburg facility had just been painted, and the fumes caused the plaintiff to feel ill.[65] Months later, the plaintiff gave birth to her child and he died the same day.[66] Ransburg argued that because the child was exposed to the fumes through his mother, the injury and his subsequent death derived from his mother's injury.[67] The court disagreed, noting that "the inquiry of whether a claim is derivative focuses not on how the injury occurred but rather on whether the claimed damages *are based upon the employee's injury*."[68] The court found that the son's claim "is in no way dependent on the validity of [his mother's] claim."[69]

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[61] *Snyder*, P.2d at 783. (emphasis added).
[62] *See* Reply at p. 6.; *Snyder*, 945 P.2d at 786.
[63] *Ransburg Indus. v. Brown*, 659 N.E.2d 1081, 1085-86 (Ind. Ct. App. 1995) (other jurisdictions have recognized that the exclusivity provision of a workers' compensation act will not bar claims for *prenatal* (not pre-conception) claims. *Thompson v. Pizza Hut of America, Inc.*, 767 F.Supp. 916 (N.D. Ill. 1991); *Namislo v. Akzo Chemicals, Inc.*, 620 So.2d 573 (Ala. 1993); *Pizza Hut of America, Inc. v. Keefe*, 900 P.2d 97 (Colo. 1995); *Cushing v. Time Saver Stores, Inc.*, 552 So.2d 730 (La. App. 1989)).
[64] *Id.* at 1082.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 1085.
[68] *Id.* (emphasis added).
[69] *Id.*

Plaintiffs rely on *Meyer v. Burger King Corp.*[70] In *Meyer*, a mother that was 35 weeks pregnant, slipped, fell and hit her abdomen on the corner of a table.[71] This trauma caused an abruption of the placenta, which in turn deprived the unborn child of oxygen.[72] As a result, the child was born with severe injuries.[73] The defendant in *Meyer* argued that it was "impossible to separate" the injuries sustained by the mother and child because the workplace injury allegedly caused the abruption of the mother's placenta.[74] But, the court in *Meyer* ultimately held that a child's claim was not barred as derivative because it was not "legally dependent" on the employee's injury and was made by one who "counts as a legal party who suffered prenatal injury."[75] The court reasoned that just because "the mother and child *in utero* are physically connected, an injury to one is not necessarily an injury to the other."[76]

According to T.I., decisions "more closely analogous to Plaintiffs' claims involve alleged toxic exposure to military personnel, resulting in genetic damage to

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[70] *Meyer v. Burger King Corp.*, 26 P.3d 925 (Wash. 2001).
[71] *Id.* at 926.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 930.
[75] *Id.*
[76] *Id.* In oral argument, Plaintiffs also relied on *Hitachi Chem. Electro-Products v. Gurley*, 466 S.E.2d 867 (Ga. App. 1995) to support their argument in this case. The Court declines to follow *Hitachi's* reasoning for two reasons. First, the Court is interpreting Texas law, not Georgia law. Texas law bars the plaintiffs' claims under the exclusivity provision of the Texas Workers' Compensation Act. Any changes to that provision should be addressed by the Texas Courts or legislature, not this Court. Second, *Hitachi* provides very little facts for the Court to use in its analysis. To summarize *Hitachi*, the Georgia Court of Appeals briefly explains the plaintiffs' causes of action, relies upon an order from the trial court for its reasoning and analysis, cites cases to explain derivative claims, and affirms the trial court's decision. Hence, this Court cannot and will not give great credence to *Hitachi* with respect to Christopher Peters' claims.

the servicemen's sperm, followed by conception of offspring born with defects."[77] T.I. claims that courts handling those cases have held that claims premised on the children's birth defects are barred as derivative of their father's military service exposure and the alleged genetic damage resulting from that exposure.[78]

In this case, however, Christopher Peters was not directly exposed to any harm in his father's workplace. Stated differently, T.I.'s alleged negligence did not cause harm to Christopher separate and apart from the harm alleged to have been caused to his father. In each of the cases cited by plaintiffs, because the children *in utero* were injured at their mothers' work places, regardless of their mothers' injuries, the courts held that the children could recover for their injuries. Simply put, none of the children's claims were based upon the validity of their mothers' injuries.[79] The children suffered their own, separate injuries *in utero*.

The crux of the Court's inquiry rests on whether the claim in this case derives from an injury to Grady, or whether the claim derives from an independent injury suffered by Christopher. Here, the viability of Christopher's claim depends on the validity of Grady's claim. Christopher's claim is not based solely on

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[77] *See* Reply at p. 6.

[78] *Id.*; *see also Feres v. United States*, 340 U.S. 135, 146 (1950) (finding that the United States Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service); *Minns v. United States*, 155 F.3d 445, 447-50 (4th Cir. 1998) (noting that plaintiffs rested their theory of recovery on the fact that toxins were possibly stored in servicemen's semen and passed it on to their wives); *Hinkie v. United States*, 715 F.2d 96, 98 (3d Cir. 1983) (alleged chromosomal damage from radiation exposure while on active duty in the United States Army); *Clark v. United States*, 974 F. Supp. 895, 896 (E.D. Tex. 1996) (alleging birth defects were caused by soldier's exposure to toxins, medications, and shots received while in Saudi Arabia prior to fathering a child).

[79] *Ransburg*, 659 N.E.2d at 1085; *Meyer*, 26 P.3d at 930.

injuries he sustained. To recover, Christopher would have to show, *inter alia*, the insult to Grady proximately caused Christopher's injury. To make this showing, Christopher has to prove T.I.'s alleged negligent conduct caused injury to Grady's sperm.

Consequently, the Court finds that Christopher's claim is "legally dependent" and thus derivative of Grady's. As such, the exclusivity provision of the Texas Workers' Compensation Act bars the plaintiffs' claims.

B. Preconception Tort Liability

To the extent plaintiffs seek to hold T.I. liable for activity predating Christopher's conception, plaintiffs argue that T.I. is liable for a preconception tort. In other words, by arguing that the alleged injury to Christopher is independent of any asserted insult or injury to his father, "Plaintiffs are necessarily asking this Court to recognize a claim by Christopher Peters premised on preconception injury to his father."[80] While Texas courts recognize that family members' claims that are derivative of the employee's claim are included within the exclusivity provision of the Texas Workers' Compensation Act, plaintiffs correctly point out that no Texas case directly addresses this present situation, *i.e.*, the alleged preconception injury resulting from Grady's workplace exposure. The only

[80] *See* Reply at p. 8

reported Texas appellate decision referencing the term "preconception" or "preconception tort," is *Fox v. Estrada*.[81]

In *Fox*, the plaintiff's mother received blood transfusions following gynecological surgery in 1982 intended to help her conceive a child.[82] Two years later the mother gave birth.[83] Shortly after giving birth, the mother became ill and testing revealed that she had contracted HIV.[84] Seven years later the mother died from complications associated with AIDS.[85] Her spouse and child filed suit for medical malpractice, alleging negligence in the ordering of the infected transfusion.[86]

The trial court granted one physician defendant's motion for summary judgment, holding that he owed no duty to the plaintiffs and that "Texas does not recognize preconception torts."[87] The Texas Court of Appeals affirmed on the basis that it was not foreseeable based on existing knowledge in 1982 that a blood transfusion could transmit HIV virus.[88] The court said that given its finding, it did not need to reach the question of whether Texas law recognized a preconception tort.[89]

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[81] *Fox v. Estrada*, 14-97-00821-CV, 1998 WL 831666 (Tex. App. Dec. 3, 1998) (not designated for publication).
[82] *Id.* at *1.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *See id.* at *1.
[88] *Id.* at *3-4.
[89] *Id.* at *4.

In a later case, however, the Texas Court of Appeals was unwilling to recognize potential preconception liability, finding that such matters were squarely within the purview of the legislature.[90] In *Chenault v. Huie*,[91] suit was filed on behalf of a child born with cerebral palsy alleging that the mother's conduct during pregnancy resulted in the child's injuries. After much discussion about the ramifications of imposing a duty of care on a pregnant woman toward an unborn child, the court affirmed summary judgment in favor of the mother.[92] In so holding, the court noted:

> Defining the nature of the duty necessarily requires pinpointing when the duty arises. In one case, third-party liability to a fetus has been found based on conduct occurring many years before the child was conceived. In *Renslow v. Mennonite Hospital*, 67 Ill. 2d. 348, 10 Ill. Dec. 484, 367 N.E.2d 1250 (1977), the defendants were held liable to a child for negligently transfusing the mother with incompatible blood eight years before the child was conceived . . . .
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> To the extent a workable standard of care could be developed or the scope of conduct to which the standard is applied could be limited, it would only be through extensive research and analysis of scientific and medical data, an evaluation of broad matters of public policy, and the development of specific laws to address the concerns and needs of the citizenry. *These matters are uniquely within the realm of the legislature, not the judiciary. It is*

[90] *See Chenault v. Huie*, 989 S.W.2d 474 (Tex. App. 1999).
[91] *Id.* at 474.
[92] *Id.* at 478.

the legislature's role to reflect the values of its constituents in its creation of laws.[93]

T.I. correctly notes that the Texas Court of Appeals refused to adopt preconception tort liability in *Chenault*, recognizing that not only would that expand liability, but that such an expansion of liability should be created legislatively, not through judicial action.[94]

In *Roberts v. Williamson*,[95] the Texas Supreme Court declined to extend a claim for loss of consortium to parents of a child who had been seriously injured. In so holding, the court proclaimed that," [w]hen recognizing a new cause of action and the accompanying expansion of a duty, [the Court] must perform something akin to a cost-benefit analysis to assure that the expansion of the duty is justified.[96] *Roberts* makes clear that in Texas, the absence of the court's specific rejection of a particular cause of action does not automatically create a cognizable legal claim.[97]

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[93] *Id.* at 477-48. (emphasis added). During oral argument, Plaintiffs argued that preconception torts deal with foreseeability, which prevents the Court from deciding this case on the pleadings. Rather, plaintiffs argued this is an issue for a jury to decide. Even if the Court assumes for the purposes of argument that Christopher Peters' injuries were foreseeable, because no Texas Court has recognized preconception tort liability to date, and the court in *Chenault* said it is a legislative issue, this Court will not recognize preconception tort liability in Texas. As such, the Court never reaches the issue of foreseeability because plaintiffs' claim is barred, and thus ripe for dismissal on the pleadings.

[94] *See* Reply at p. 10; *see also Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003).

[95] *Roberts*, 111 S.W.3d at 118-20.

[96] *Id.* at 118.

[97] At oral argument, T.I. made clear that loss of consortium claims are not recognized under Texas law in this particular situation, and that plaintiffs' offer no opposition on that specific point.

Contrary to plaintiffs' contention that "there is no exception to the general rule for 'preconception liability,'"[98] where an alleged injury is caused indirectly through harm to another, Texas law generally denies recovery.[99] As noted by the court in *Roberts*, "There are exceptions to the general rule . . . [b]ut all these exceptions have been narrowly cabined."[100]

After carefully reviewing the authorities relied upon by the parties, the Court is satisfied that Texas appellate courts have not recognized preconception tort liability, and this Court will not recognize this tort in the absence of Texas law establishing it.[101]

Therefore, Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

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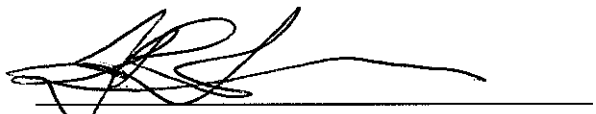
[98] *See* Plaintiffs' Surreply in Opposition to Defendant's Motion to Dismiss at p. 6. ("[T]he question is not whether a particular cause of action has been recognized, but whether there is any Texas precedent that categorically bars the imposition of liability on these facts.") (Trans. ID. 38346530).

[99] *Roberts*, 111 S.W.3d at 118. ("the law ordinarily denies recourse to those not directly injured by a negligent act, but whose injury is caused indirectly by harm to another.").

[100] *Id.*

[101] In so holding, the Court notes that courts in other jurisdictions grappling with facts somewhat analogous to the instant case have refused to recognize a claim for preconception tort. *See Whitlock v. Pepsi Americus*, 681 F. Supp. 2d 1123, 1126-27 (N.D. Cal. 2010) (finding that a preconception duty only exists in the context of the defendant providing medical services or products related to the reproductive process); *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198, 203 (N.Y. 1991) (finding no preconception duty, and noting that it is the courts duty to "confine liability within manageable limits."); *Albala v. City of New York*, 429 N.E.2d 786, 787-88 (N.Y. 1981) (finding no preconception liability where doctor damaged mother's uterus seven years prior to child's birth resulting in brain damage); *Ruffing v. Union Carbide Corp.*, 766 N.Y.S.2d 439, 441 (N.Y. App. Div. 2003) (declining to recognize a cause of action where plaintiff alleged wife and *in utero* daughter were exposed to hazardous chemicals on his clothing and within his body) ; *Widera v. Ettco Wire and Cable Corp.*, 611 N.Y.S.2d 569, 571 (N.Y. App. Div. 1994) (declining to recognize a duty owed to plaintiff where claim asserted child was harmed by exposure to toxic chemicals *in utero* when mother washed father's clothes); *Catherwood v. American Sterilizer Co.*, 498 N.Y.S.2d 703 (N.Y. Sup. Ct. 1986), *aff'd*, 511 N.Y.S.2d 805 (N.Y. App. Div. 1987) (granting Motion to Dismiss where child sustained chromosomal damage as a result of mother's exposure to ethylene oxide prior to conception).



Jan R. Jurden

cc: Prothonotary